In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1403

PETER W. WEBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erroneously denied without a hearing his motion under 28 U.S.C. 2255, in which he alleged a systematic exclusion of women from the grand jury that indicted him and a denial of due process during trial arising from a cumulation of trial errors.

Petitioner was convicted in the United States District Court for the District of New Jersey on six counts of an eight-count indictment charging violations of the Taft-Hartley Act, 29 U.S.C. 186(b), and the Hobbs Act, 18 U.S.C. 1951. He was sentenced to 10 years' imprisonment and fined $30,000. The court of appeals affirmed (437 F.2d 327), and this Court denied certiorari (402 U.S. 932).

Thereafter, petitioner filed a motion under 28 U.S.C. 2255 to set aside his conviction and sentence, contending, *inter alia*, that (1) his indictment was returned by the same grand jury that the court of appeals—subsequent to petitioner's direct appeal—found to be improperly constituted because women were systematically discriminated against in the selection process (see *United States* v. *Zirpolo*, 450 F.2d 424); and (2) he was deprived of due process of law because of a cumulation of errors during his trial. The district court denied his motion without hearing evidence (Pet. App. 12A-15A), and the court of appeals affirmed by *per curiam* order (Pet. App. 19A).

As petitioner acknowledges (Pet. 5), he filed no pretrial challenge to the array on the ground that the grand jury was unlawfully selected due to discrimination against women. His post-trial challenge was therefore untimely under Rule 12(b)(2), Fed. R. Crim. P. See *Davis* v. *United States*, 411 U.S. 233. Nor has petitioner submitted any tenable basis for distinguishing *Davis*.

His contention of a due process violation through a cumulation of trial errors was considered on direct appeal by the court of appeals, which held that, "[s]ince we have examined all the errors alleged by Weber and have found no impermissible procedures, we cannot agree that viewing the trial in its entirety reveals a deprivation of due process" (437 F.2d at 340). Since the claim was considered and rejected on direct appeal, the district court correctly denied relief without a hearing. *Kaufman* v. *United States*, 394 U.S. 217, 227, n. 8; cf. *Sanders* v. *United States*, 373 U.S. 1.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.